IN THE

Supreme Court of the United States

October Term, 1959

No. 152

THOMAS W. NELSON,

Petitioner,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Respondents.

ARTHUR GLOBE,

Petitioner,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division One.

BRIEF FOR RESPONDENTS.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

RULES PAGE

STATUTES

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BRIEF FOR RESPONDENTS.

Citations to Opinions Below.

The Superior Court of the State of California in and for the County of Los Angeles, in which court *Nelson* and *Globe* originated, issued no formal opinion. However its findings and judgment in each case appears at R. 123-126 (*Nelson*), and R. 179-183 (*Globe*). The opinions of the District Court of Appeal of the State of California in the *Nelson* and *Globe* cases respectively [R.

133, 185] are reported at 163 Cal. App. 2d 607, 329 P. 2d 978 and 163 Cal. App. 2d 595, 329 P. 2d 971. The denial of hearing by the Supreme Court of California, with three judges dissenting, in the *Nelson* and *Globe* cases respectively [R. 159, 214] are reported at 163 Cal. App. 2d 607 at 614, and 163 Cal. App. 2d 595 at 606.

Constitutional, Statutory and Charter Provisions and Regulations Involved.

In addition to the Constitutional and Statutory provisions set forth in the Brief for Petitioners, certain provisions of the Charter of the County of Los Angeles, State of California, and Civil Service Rules for the County of Los Angeles, State of California; are also applicable and are here set forth in relevant part.

Charter of the County of Los Angeles, State of California:

Section 34 of Article IX:

> "Sec. 34. The Commission shall prescribe, amend and enforce rules for the classified service, which shall have the force and effect of law; . . .
>
> The rules shall provide:
>
> . . .
>
> (7) For a period of probation not to exceed six months before appointment or promotion is made complete, during which period a probationer may be discharged or reduced with the consent of the Commission.
>
> (9) For temporary employment of persons on the eligible list. . . .".

Civil Service Rules for the County of Los Angeles, State of California:

"19.07. *Probationary Period Following First Appointment.*

An employee who has not yet completed his first probationary period may be discharged or reduced in accordance with Rule 19.09 by the appointing power by written notice, served on the employee and copy filed with the Commission, specifying the grounds and the particular facts on which the discharge or reduction is based. Such an employee shall be entitled to answer, explain, or deny the charges in writing within ten business days but shall not be entitled to a hearing, except in case of fraud or of discrimination because of political or religious opinions, racial extraction, or organized labor membership.

19.09. *Consent of Commission.*

. . . . . .

If the Commission has consented prior to the filing of an answer by the employee and such answer alleges fraud, or discrimination as above stated, and requests a hearing, the Commission shall immediately set aside its consent. The hearing shall be limited to the question of fraud or discrimination. After such hearing the Commission may consent to the discharge or may order such employee reinstated, and unless such order otherwise provides, it shall be effective as of the date of the discharge or reduction.

No consent need be secured to the discharge or reduction of a temporary or recurrent employee."

Questions Presented.

Two questions are presented by the *Nelson* and *Globe* cases:

(1) Whether the discharge hearing afforded Nelson was in accordance with the due process guarantee of the Fourteenth Amendment to the United States Constitution?

(2) Whether a temporary county employee is entitled to a hearing regarding his discharge for a violation of Section 1028.1 of the Government Code of the State of California.[1]

Statement of the Cases.

1. Nelson's Employment Record and Discharge Procedure.

Nelson applied for a position with the County of Los Angeles on March 17, 1952 [R. 56]. He signed the State and County loyalty oaths [R. 108, 114], and on April 1, 1952, was hired by the County of Los Angeles as a social worker with the Department of Charities [R. 107-113].

On June 16, 1953, Nelson became a permanent county employee in the position of medical social worker, a position he held until his discharge on May 2, 1956 [R. 107-113, Find. of Super. Ct., R. 123-124].

The Board of Supervisors of the County of Los Angeles on February 19, 1952 adopted an order concerning

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[1]Petitioner's Brief asserts an alleged violation of the Federal supremacy principle of Article VI of the Federal Constitution as one of the Questions Presented (Pet. Br. p. 4). This point was not raised in the Petition for Certiorari (Pet. for Hearing, p. 3) and it would seem inappropriate to raise the question at this time. Revised Rules of the Supreme Court 23(1)(c); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 177-178; *Irvine v. California*, 347 U. S. 128, 129.

personal appearances of certain county employees before the United States Congressional House Un-American Activities Committee. That order made it the duty of every county employee who might be subpoenaed by that Committee to appear before it and to answer certain specifically designated questions relating to the Communist conspiracy. One of these designated questions related to membership of the employee in the Communist Party [R. 101]. Refusal to answer these specific questions was to be considered as insubordination, constituting grounds for discharge [R. 101-102]. This Board order was shortly thereafter superseded by, but is in substance the same as, Section 1028.1 of the Government Code of the State of California. For example, Section 1028.1(d) provides that county employees have the duty to answer questions relating to "present knowing membership of such employee in the Communist Party or as to past knowing membership in the Communist Party at any time since October 3, 1945."

The county subsequently adopted the procedure of personally serving a copy of the Board's order of February 19, 1952, on every county employee subpoenaed by the Committee on Un-American Activities of the House of Representatives in order to inform the employee of his duty to testify before the Committee as to this type of question if called before it, and to inform him of his liability to discharge in the event of failure to discharge the duty.

Pursuant to this practice, on April 4, 1956, Nelson was personally served with a copy of the Board's order of February 19, 1952 [R. 97] and on April 20, 1956 pursuant to a subpoena and accompanied by counsel, Nelson appeared and testified before the Subcommittee of the House Committee [R. 21-107, 114]. After answering a

few preliminary questions concerning his educational background and previous employment [R. 21-24]. Nelson objected to the right of the Subcommittee to ask questions concerning the reasons why he was discharged from previous government employment on the grounds that such questions were outside the Committee's jurisdiction [R. 25, 28, 29]. Thereafter, on the basis of the First and Fifth Amendments of the United States Constitution, Nelson specifically declined to answer, among others, the following questions:

> "Were you a member of the Communist Party at any time between 1947 and 1949? That was the period you were in Japan." [R. 26, Find. of Super. Ct. R. 124.]
>
> "Have you at any time been a member of the Communist Party?" [R. 31, Find. of Super. Ct. , R. 124].
>
> "Were you a member of the Communist Party between 1951 and '52 when you served as an officer of the State parole system for the State of California?" [R. 36, Find. of Super. Ct., R. 124].
>
> "Are you a member of the Communist Party today?" [R. 38, Find. of Super. Ct., R. 124].

On May 2, 1956, Nelson was notified in writing of his discharge from county service because of his refusal to answer these questions before the Committee on Un-American Activities [R. 114-117, Find. of Super. Ct., R. 124]. This notification advised Nelson that he could request a hearing before the Civil Service Commission on the charges placed against him. Thereafter, on June 11, 1956, at Nelson's request, and as required by law, the Civil Service Commission of the County of Los Angeles held

a hearing on Nelson's discharge. Nelson attended the hearing in person, accompanied by his counsel [R. 1].

The County of Los Angeles, by way of stipulation, offered Nelson's employment record [R. 2-3], evidence of Nelson's receipt of a copy of the order of the Board of Supervisors relative to his duty as a county employee to answer questions before the House Committee on Un-American Activities [R. 3] and evidence of his appearance under subpoena before the House Committee [R. 3]. In addition, the county introduced, by stipulation, the transcript of Nelson's testimony on April 20, 1956, before the House Committee [R. 4-5], and the fact of Nelson's discharge and request for hearing [R. 5]. The County then rested.

On Nelson's behalf, his counsel introduced, by stipulation, Nelson's personnel record and the introductory statement made at the opening of the House Committee hearings [R. 6-7]. Nelson indicated through his counsel that he did not care to offer any evidence or testify before the Commission. He merely wished to have his counsel state his position in regard to his discharge [R. 7]. In response to the hearing chairman's question "Now, you just want to argue?" Nelson's counsel stated: "That is all." [R. 7]. At no time during the hearing did Nelson offer to take the stand in his own behalf and he offered no testimony and no witnesses [R. 5-7].

Thereafter, the Civil Service Commission, on the basis of the evidence before it, concluded that Nelson was guilty of insubordination and guilty of violating Section 1028.1 of the Government Code of the state of California, and that the facts and reasons justified Nelson's discharge [R. 103-106].

2. Globe's Employment Record and Discharge Procedure.

On March 28, 1955, Globe was employed as a non-eligible, temporary employee in the position of social worker in the County of Los Angeles Department of Charities [R. 166, 172, Find. of Super. Ct., R. 180]. In that position, Globe became a temporary eligible employee on May 1, 1955 [R. 172, Find. of Super Ct., R. 180], and continued in county employment until his discharge on May 2, 1956 [R. 166, 172; Find. of Super. Ct., R. 180]. In 1955, Globe took the State loyalty oath [R. 167, 176]. Globe became eligible for appointment as a permanent county employee on March 24, 1956 [R. 167, 176]. However at no time did he attain permanent status.

Pursuant to subpoena served on him on April 6, 1956 [R. 166, 172, Find. of Super. Ct. 180], Globe, accompanied by his counsel appeared and testified on April 20, 1956, at a hearing of a subcommittee of the Committee on Un-American Activities of the House of Representatives [R. 166, 172, Find. of Super. Ct., R. 180].[2] After answering a few preliminary questions, regarding his educational experience [R. 160], Globe objected to, but finally answered, questions directed to his past employment record [R. 160-162, 173]. However, Globe refused to answer other questions relating to his personal knowledge of the existence of, and personal membership in, an organization at the University of Southern California known as the John Reid Club of the Communist Party [R. 162-

[2]It should be noted that the letter sent to Globe notifying him of his discharge, quoted verbatim in the record [R. 177-179], indicates that Globe, prior to his appearance before the Subcommittee, in accordance with established County policy, was personally served with a copy of the Board order of February 19, 1952, which sets forth the duty of county employees to testify before the House Un-American Activities Committee and the liability to discharge in the event of failure to perform their duty [R. 101-102].

163, 173-174]. He also refused to answer the direct question: "Are you a member of the Communist Party now?" [R. 164, 175, Find. of Super. Ct., R. 180]. His refusals to answer these questions were based on the First and Fifth Amendments to the United States Constitution [R. 162-164, 173-175, Find. of Super. Ct., R. 180].

On May 2, 1956, Globe was notified in writing that he was discharged on the grounds that by refusing to answer the question relating to his present membership in the Communist Party he had been guilty of insubordination and of violation of Section 1028.1 of the Government Code of the State of California [R. 177-179; see, Find. of Super. Ct., R. 180]. Upon his discharge Globe requested and was granted a hearing by the County of Los Angeles Civil Service Commission concerning his discharge as is provided by law [R. 167, 176, Find. of Super. Ct., R. 181]. Globe appeared before the Commission on May 29, 1956 and was denied a discharge hearing [R. 167, 176, Find. of Super. Ct., R. 181] on the ground that he was a temporary employee, and as such, not entitled to such a hearing [See, R. 176].

3. Proceedings in the Courts Below.

Nelson and Globe each filed a petition for a writ of mandate in the Superior Court of California, seeking reinstatement [R. 106, 165]. The Superior Court found that Nelson had been discharged in the manner prescribed by law and that he had been given a full and fair hearing on his discharge during the course of which he was given the opportunity to explain his reasons for his refusal to testify before the Subcommittee of the House Committee [R. 125]. Nelson's discharge was upheld and the Superior Court denied the writ [R. 126]. As to Globe, the Superior Court found that, regardless of his status as a

temporary employee, Globe could not be discharged from his employment without being afforded a full hearing as to the sufficiency of his reasons for invoking the First and Fifth Amendments to the United States Constitution while testifying before the Sub-committee of the House Committee [R. 181]. The writ of mandate was therefore granted as to Globe [R. 183].

Both decisions were appealed to the District Court of Appeal [R. 127, 183]. The Court of Appeal upheld the discharge procedures followed in both cases, affirming Nelson's discharge [R. 133-140] and reversing the Superior Court's judgment as to Globe [R. 187-198]. The Court determined that the purpose of Nelson's discharge hearing was to afford him an opportunity to explain his reasons for exercising the privilege against self-incrimination [R. 136-138], thus allowing the county to decide at that point whether the circumstances were such as to warrant dismissal [R. 137].

After reviewing the evidence and the applicable law, the Court of Appeal concluded that Nelson, as a permanent county employee, had been afforded the opportunity for a full hearing on his discharge which due process requires under the case of *Slochower v. Board of Education*, 350 U. S. 551, and *Board of Education v. Mass.*, 47 Cal. 2d 494 [R. 134-138]. Globe, on the other hand, being only a temporary county employee, was held not to be entitled, by law, to a hearing [R. 192-197].

The Court of Appeal considered and rejected arguments by Nelson and Globe that the authorizing resolution of the congressional committee was too broad and vague in view of this Court's decision in *Watkins v. United States*, 354 U. S. 178. *Watkins* was held to be factually dissimilar [R. 139, 198].

The Supreme Court of California, by divided court and without opinion, denied petitions by Nelson and Globe requesting a hearing [R. 159, 214].

Summary of Argument.

Petitioners would concede, and we agree, that the State has a legitimate and real interest in inquiring into the fitness of its employees for continued public employment. This permissible area of inquiry extends to questions directed at the employee's membership in the Communist Party.

Public employees, much like Caesar's wife, should and must act above suspicion. Correspondingly, when during the course of inquiry they are faced with pertinent questions relative to their fitness to public employment they have the obligation to be candid and cooperative. (*Cf. Beilan v. Board of Education*, 357 U. S. 399 at p. 405.) If the duties of candor and cooperation are present as an underlying basis of the public employer-employee relationship, they are present *a fortiori* where the State makes these duties specific by statute. They have this obligation and duty even though the answers may, under some circumstances, amount to self-incrimination.

We submit that the area of candor and cooperation should not be limited to situations where the questions are posed in the first instance by the immediate governmental employer. The duties of candor and of cooperativeness should properly extend to areas where pertinent inquiry is made by other governmental entities such as the Federal Government. Especially, this is so, where as in the instant cases, the scope of the federal inquiry was announced as being directed at Communist Party activities of individuals in the field of government [R. 19].

Petitioners, as public employees, could not be forced to give answers which may tend to incriminate them but they could validly be required to choose between the exercise of the privilege against self-incrimination and continued public employment. Having elected to exercise the privilege, petitioners cannot now say that they were denied its protection.

As refusal to answer certain pertinent questions is defined by statute as insubordination, the public employer had the duty in the face of the course of conduct taken by petitioners to discharge them "in the manner provided by law."

Petitioner Nelson, subsequent to his discharge for statutory insubordination and violation of the California statute, was afforded a full hearing on his discharge which due process demands. That hearing, held at the request of Nelson, was for the purpose of giving Nelson an opportunity to explain the reason which he has refused to testify before the Federal Committee. The scope of that hearing admittedly was limited but not through any actions of the employer. Nelson, by his refusal to testify or offer any evidence concerning his reasons for his refusal to testify before the House Sub-committee or matters germane thereto, voluntarily limited the scope of the inquiry.

California courts in interpreting the California statute under which Nelson was discharged have indicated that the public employer at the hearing has a discretion to approve the discharge or reinstate the employee. By his own acts, Nelson eliminated the exercise of that discretion, requiring the finding by his employer he was insubordinate and in violation of the California statute.

Globe was not afforded a discharge hearing because none was provided by law. As a temporary employee, he

could be summarily discharged. We submit that the State has broad powers in the discharge of its employees and that there is no arbitrary or unreasonable distinction when a discharge hearing is given permanent employees with tenure while denying such a hearing to temporary employees. Such employees have no vested right to continue in public employment. Globe, by his summary discharge, was therefore not divested of any right. Even conceding that a temporary employee may not be discharged for arbitrary or discriminatory grounds still the point is that Globe was discharged for the violation of his statutory duty to cooperate by answering pertinent inquiries made by a duly authorized Federal Committee. It was the fact that he did not answer, rather than the fact that he exercised a Federal privilege that triggered his discharge.

It has been conclusively established by this Court that the Federal Committee, before whom both Nelson and Globe were summoned, is duly authorized to propound the particular types of questions which petitioners refused to answer [*Barenblatt v. United States*, 360 U. S. 109]. Petitioners had the right under the Fifth Amendment to the United States Constitution to refuse to answer these pertinent inquiries, but, on balance, did not have the right to refuse to answer on the basis of a First Amendment privilege.

There is no evidence in the record that the California statute operates or was used as an instrument of coercion in an effort to curtail the exercise of any constitutional privilege by petitioners. Nor can it be said that the California statute abridges any privilege or immunity of citizens of the United States. If petitioners discharge was not repugnant to the due process clause of the United States Constitution, it did not violate the privilege and immunities clause.

ARGUMENT.

POINT I.

The Discharge of Public Employees for Insubordination Resulting From Refusal to Answer Questions Before a Congressional Committee Under the Claim of the First and Fifth Amendment Privilege Does Not Violate Due Process of Law.

Due Process of Law Does Not Prohibit the Discharge of Public Employees Who Refuse to Answer Questions Under the Claim of Privilege.

Petitioners contend that their discharge pursuant to statute, based on their refusal on constitutional grounds to answer questions asked by a congressional committee is arbitrary and unreasonable. We submit that this argument should be rejected by this Court.

It is settled law that a public employer has the right to make certain inquiries of his employees regarding their fitness for continued employment. In *Steinmetz v. Cal. State Board of Education*, 44 Cal. 2d 816, cert. den. 351 U. S. 915, the California Supreme Court in construing the self-same statute under consideration in the instant cases stated at page 823.

> "The statute under which petitioner was dismissed is not rendered invalid by the fact that it requires an employee to answer questions as to his membership in the Communist Party without regard to his knowledge of the nature of the party. Petitioner's discharge was not because of membership in the proscribed organization but because of his refusal to answer questions as to whether or not he held membership in the Communist Party. A governmental body may, of course, make reasonable inquiries into matters pertaining to the fitness of its employees. Loy-

alty on the part of those in public employment is important to orderly and dependable government and is, therefore, relevant to fitness for such employment. (*Pockman v. Leonard*, 39 Cal. 2d 676, 687 [249 P. 2d 267].) An employee's associates, as well as his conduct, are factors which may be considered by a state agency in determining his loyalty, and information on that subject may properly be elicited from him. (*Adler v. Board of Education*, 342 U. S. 485, 492-493 [72 S. Ct. 380, 96 L. Ed. 517, 27 A. L. R. 472]; *Pockman v. Leonard*, 39 Cal. 2d 676, 685-687 [249 P. 2d 267].) In this connection, it has been held that a public employer may constitutionally require its employees to disclose any past or present membership in the Communist Party. (Garner v. Board of Public Works, 341 U. S. 716, 720 [71 S. Ct. 909, 95 L. Ed. 1317].)" (*Cf. Beilan v. Board of Public Education*, 357 U. S. 399, and *Lerner v. Casey*, 357 U. S. 468.)

Petitioners, as public employees have certain obligations as well as rights. The right to be selected and appointed for public employment and in due course, the right of tenure in that employment imply concurrent obligations of good citizenship, the performance of employmental duties, and, where required by statute or otherwise, cooperation with governmental bodies making proper inquiries into matters affecting public employment, whether these governmental bodies be local, state or federal. (*Cf. Beilan v. Board of Education*, 357 U. S. 399 at p. 405. In the instant cases the State has been fit to delineate and clarify the extent of these obligations through the use of Section 1028.1 of the Government Code. This was not a duty in the abstract—it is an absolute duty of co-

operation directly imposed by the State on all public employees.

When petitioners obstructed the course of legitimate governmental inquiry they destroyed the facade of confidence which their employer and the public had erected around them. Petitioners directly and knowingly refused to embark on a course of conduct which their employer had every right to expect them to follow. In failing to stay within certain circumscribed bounds of conduct, they were insubordinate as defined in the statute.

It was then the duty of their employer to consider whether by their insubordinate refusal to testify their fitness for further public employment had become impaired. It is at this point that attention must be focused. Petitioners were not dismissed from public employment because they had exercised a legal right to remain silent in the face of legitimate inquiry. They were dismissed because their insubordinate conduct had indicated a lack of those qualities of candor and cooperation that the public and their public employer had every right to expect from them as public employees. Even more than the non-performance of an obligation to explain one's conduct to one's superiors in employment, the refusal to perform a statutory duty is a means of measuring lack of fitness for employment. This not because of any unfavorable inference of disloyalty or misconduct, inferences firmly rejected by the Court below [R. 139, 195 and see, *Konigsberg v. State Bar*, 353 U. S. 252 at p. 270], but because the manifested unwillingness to answer proper questions is in itelf the disqualifying fact.

Public employment is a privilege which the State can grant on such terms as it sees fit to impose. When petitioners were first employed, they knew or should have

known that as part of their duties as public employees they would be required if the occasion arose, to respond to a pertinent inquiry by a Congressional Committee. When summoned before the Committee they had a choice between continued public employment and the exercise of the constitutional privilege against self-incrimination.

Petitioners argue that their discharge had no relation to the determination of their fitness for employment because the applicable California loyalty procedure had already been applied to each petitioner.

Obviously, the State does not consider compliance with the State or county loyalty programs sufficient protection for the public. Past pledges or oaths of loyalty are not a sufficient indication of presently held loyalties. The State's manifest responsibility to its citizens requires that public employees stand up and be counted. In addition, public employees have the responsibility to maintain continued fitness for employment because the mere fact of Communist Party membership constitutes grounds for dismissal under Section 1028 of the Government Code[3] and prohibits the holding of public employment under Article XX, Section 19 of the California Constitution.[4]

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[3]Section 1028 of the Government Code provides:

"It shall be sufficient cause for the dismissal of any public employee when such public employee advocates or is knowingly a member of the Communist Party or of an organization which during the time of his membership he knows advocates overthrow of the Government of the United States or of any state by force or violence."

[4]Article XX, Section 19 of the California Constitution, so far as material, provides:

"Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support

Slochower v. Board of Education, 350 U. S. 551 Does Not Prohibit a Discharge Based on Refusals to Answer Before a Congressional Committee.

In their constitutional argument, petitioners rely on *Slochower v. Board of Education*, 350 U. S. 551 as indicating that a discharge based on events occurring before a congressional committee is in itself arbitrary and unconstitutional. Slochower, a teacher in a public college in New York City refused to testify before the Internal Securities Subcommittee of the United States Senate when asked whether he had been a member of the Communist Party prior to 1941. He invoked the privilege of the Fifth Amendment. As a teacher in New York City, he was subject to Section 903 of the New York City Charter which provided that any city employee who utilized the privilege against self-incrimination to avoid answering a question relating to his official conduct should thereby have his tenure of office or employment automatically terminated. Slochower was discharged summarily without a hearing under this provision. This Court held that such a *summary* dismissal violated due process of law and remanded the case for further proceedings not inconsistent with its opinion.

The specific ground for setting aside Slochower's dismissal was the summary character of the discharge under the New York City Charter provision which made the act of claiming the privilege against self-incrimination operative *ipso facto* to discharge the employee without a hearing.

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of a foreign government against the United States in the event of hostilities shall:

"(a) Hold any office or employment under this State, including but not limited to the University of California, or with any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State; * * *."

As indicated above, the fundamental reason for petitioners' discharge was the fact of their refusal to testify and not their grounds for refusing. Their silence, their secrecy, their evasiveness made them by their own acts unfit to hold public employment. (*Cf.* dissenting opinion of Mr. Justice Reed in *Slochower v. Board of Education*, 350 U. S. 551 at 561-562.)

In *Lerner v. Casey*, 357 U. S. 468, this Court indicated that a teacher could be dismissed for incompetency for refusing to answer questions although the teacher had invoked the privilege against self-incrimination as an explanation for his silence. We submit that a Constitutional distinction should not be drawn based on where or to whom the refusal to answer is expressed provided the inquiry is a pertinent one and made in the course of legitimate investigation.

In *Slochower* this Court remanded the case for further proceedings in accordance with its opinion. If this Court had wished to make the point that dismissal from public employment could never be based on a refusal to answer pertinent questions propounded by a congressional committee, the proceedings against Slochower would have been dismissed. We submit that *Slochower* does not reach this far. The constitutional validity of discharge from public employment for refusal to answer legitimate questions does not and should not depend on whether the refusal occurred in a local, State or Federal proceeding.

The crux of this problem is pointed out in Mr. Justice Frankfurter's concurring opinion in *Lerner v. Casey* where he states (357 U. S. at p. 410):

> "The services of two public employees have been terminated because of their refusals to answer questions relevant, or not obviously irrelevant, to an in-

quiry by their supervisors into their dependability. When these two employees where discharged, they were not labeled 'disloyal.' They were discharged because governmental authorities, like other employers, sought to satisfy themselves of the dependability of employees in relation to their duties. Accordingly, they made inquiries that, it is not contradicted, could in and of themselves be made. These inquiries were balked. The services of the employees were thereby terminated."

We submit that the State as an employer has as much right to require by statute, under pain of dismissal, that the public employee answer legitimate inquiries made by the congressional committee affecting their continued fitness for public employment as it has the right to require that they answer proper and pertinent inquiries directly made by their employer.

POINT II.

The Discharge Procedure Accorded Nelson Met All the Requirements of Due Process of Law.

Petitioner Nelson argues that assuming that his discharge pursuant to statute was not arbitrary or unreasonable still he was not accorded the hearing upon his discharge which due process requires. In *Slochower, supra*, 350 U. S. 551, this Court struck down the summary dismissal of a public employee pursuant to a statute which operated to discharge *eo instante* every employee with tenure who invoked the Fifth Amendment. The summary dismissal violated due process because no consideration was given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, justification for the exercise of the privilege or

whether the plea resulted from mistake, inadvertence, or legal advice conscientiously given, whether wisely or unwisely.

The hearing given Nelson before the Civil Service Commission was contained within the shape of the mold created by *Slochower*. Section 1028.1 limits the scope of the duty to answer questions to certain questions involving only one subject matter. Further, the period to which such questions were to be directed is the present not the indefinite past. Thus, two of the factors involved in Slochower were eliminated at once from *Nelson*. Additionally, petitioner was given every opportunity to justify his exercise of the privilege. Accordingly the dictates of *Slochower* were conformed with and petitioner had exactly the full scale hearing required by due process.

Nelson argues that the invocation of his constitutional rights was the conclusive reason under the State statute, for his discharge. He asserts that the hearing afforded him was merely *pro forma* in that, in any event and no matter what the weight of evidence marshalled for his defense, he would have been discharged. Not so. The Court below stressed the fact that the California Supreme Court does not accept this strict interpretation of the California statute. The public employer at the hearing has a discretion which may be exercised if the employees' reasons for refusing to comply with his statutory duty to answer are deemed sufficient. As the Court below stated: "For what purpose would the Supreme Court insist on a full hearing to give the employee an opportunity to explain his reasons if the statute required a dismissal regardless of his explanation for refusing to answer?" [R. 137-138]. We submit that this Court is bound by this interpretation given the California statute, *Beilan v.*

Board of Public Education, 357 U. S. 399, 404; *Barsky v. Board of Regents*, 347 U. S. 442, 448.

Any contention that Nelson did not know the purpose of his discharge hearing is not sustained by the facts. The record clearly indicates that Nelson received a letter from his employer notifying him of his discharge on the grounds of insubordination and of violation of Section 1028.1 of the Government Code [R. 115-116]. In that letter Nelson was specifically advised that he could request a hearing on these charges [R. 118]. Nelson cannot now state that he did not know the purpose of the very hearing which he requested be held. The hearing was called for the purpose of giving Nelson an opportunity to explain his conduct—the reasons why he refused to answer questions asked of him by a congressional committee.

It is submitted that at the hearing Nelson received all the requisites of a "fair trial" which due process requires. Such requisites include: reasonable notice of the charges; *In re Oliver*, 333 U. S. 257; *United States v. Cruikshank*, 92 U. S. 542; the right to a hearing; *Shields v. Utah Idaho R. Co.*, 305 U. S. 177; *Palko v. Connecticut*, 302 U. S. 319; an opportunity to examine the evidence and to cross-examine witnesses supporting the charges, to offer testimony on one's own behalf, and to be represented by counsel; *In re Oliver, supra*, *Motes v. United States*, 178 U. S. 458, *Int. Com. Comm. v. Louis. & Nash. R.R.*; 227 U. S. 88.

The record is clear that Nelson at his hearing was afforded all the fundamental safeguards necessary to assure a just and fair consideration of his case. If in fact the scope of the hearing was circumscribed it was so bounded by his own actions. As the Court below stated.

> "Any argument that the county should have questioned petitioner about his reasons for invoking the

privilege is specious. The record discloses that he was given every opportunity to explain if he wished to do so and 'an opportunity to explain' does not imply that the county must illicit the information from the employee. Whether his explanation comes through query of the employer or the employee's own counsel would seem immaterial as long as the employee is given a full hearing in which he is given an opportunity to explain his reasons. The hearing is for the purpose of giving him the opportunity to explain. If he chooses to remain silent and not do so, he cannot now say he has been denied due process. If petitioners hearing was limited in any way, it was limited by his own voluntary choice to remain silent." [R. 138].

Lastly the implication that the loss of his position in public employment is a permanent deprivation of his means of livelihood and is improper under the circumstances, is unwarranted. It should be noted that the statute involved in *Slochower, supra*, unlike the statute involved here, by its very terms provided that city employees would be permanently disqualified from "election or appointment to any office or employment under the city or any agency." The California statute nowhere goes to this extreme and in actual practice on the local level, at least discharge from previous government employment obviously does not bar further public employment. Nelson, in point of fact, despite notifying the County of Los Angeles of his two previous discharges from governmental employ [R. 63] was still able to secure further public employment.

To intimate that it is improper to impose a civil penalty for exercise of a constitutional right is not war-

ranted. Mr. Justice Holmes stated the correct principle in his frequently quoted statement in *McAuliffe v. New Bedford*, 155 Mass. 216:

> "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman."

And compare *Lerner v. Casey*, 357 U. S. 468, where this Court sustained the dismissal of a public employee for failure to answer pertinent questions under a claim of the privilege against self-incrimination.

POINT III.

Due Process Does Not Require That Temporary Public Employees Must Be Afforded the Same Discharge Hearing That Is Afforded Public Employees With Tenure.

Petitioner Globe's attempts to equate his constitutional arguments with those of Nelson ignore the very essence of the difference between temporary public employees and those with tenure under the Los Angeles County Charter (Sec. 34, Art. IX) and the Rules of the Los Angeles County Civil Service Commission (Secs. 19.07 and 19.09).

As a temporary employee, Globe had none of the vested rights of permanency and could be summarily discharged. Due process does not require a hearing where one is not being deprived or divested of anything to which he has a right. (*Cf. Bailey v. Richardson*, 182 F. 2d 46, aff'd 341 U. S. 918; *Friedman v. Schwellenbach*, 159 F. 2d 22). Petitioners' reliance on *Slochower* is misplaced since Slochower was a permanent employee and entitled to tenure under the applicable New York state law. Here Globe was only in the status of an applicant for public employ-

ment. To argue that a person with such a tenuous hold on the public rolls has a vested right to such employment is to allow privilege and to destory the importance of tenure.

Even if a vested right were involved, due process does not always require a hearing. (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 at p. 162.)

Slochower indicates that individuals may not have a constitutional right to public employment.

> "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities." (350 U. S. at p. 555).

This Court has not yet made the broad assertion attributed to it by Globe that there is no real difference between permanent and temporary employees with respect to their methods of discharge. To the contrary we submit that there is a very real and substantial difference.

Even conceding, *arguendo*, that Globe may not be discharged summarily for arbitrary or discriminatory reasons, we have shown above that his discharge was not arbitrary and that it related to a real interest of the State in informing itself as to the continued fitness of its employees for further public service. Globe was discharged for the failure to perform a specific statutory duty—the duty to answer legitimate and pertinent inquiries made by a governmental body relating to activities which if found to be present could lead to dismissal (*Cf.* Sec. 1028, Govt. Code; Art. XX, Sec. 19 of the State Constitution). In failing to perform this statutory duty, Globe was insubordinate and showed himself to be unfit for

further public employment. His dismissal was therefore not patently arbitrary or discriminatory. The controlling provisions of the County Charter and the Civil Service Rules do not permit a hearing to persons in Globe's status except in certain specific instances such as a claim of discrimination because of political or religious opinion, racial extraction or organized labor membership. Since no such claim was made by Globe, no right to a hearing was present.

Any argument that Globe would be penalized in his search for future employment because he was discharged because of an inference of disloyalty is without foundation in the record. The Court below made clear that any implication of guilt for invoking the privilege against self-incrimination was not involved in the discharge and was not material [R. 195].

POINT IV.

The Questions Asked of Nelson and Globe by the Committee Were Pertinent to the Subject Matter of the Investigation.

In the Court below, petitioners, relying on *Watkins v. United States*, 354 U. S. 178, contended that the Congressional Committee was not duly authorized for the reason that the authorizing resolution was too broad and vague in its terminology which empowered the committee to investigate un-American and subversive activities [R. 139, 198].

Petitioners apparently have abandoned this tack in view of the recent holding of this Court that Rule XI under which the Committee operated is not "constitutionally infirm on the score of vagueness." (*Barenblatt v. United States*, 360 U. S. 109 at pp. 122-123.) There can be no doubt now but that the Subcommittee of the House Un-

American Activities Committee, before whom petitioners appeared was "duly authorized" and as such had the authority to compel testimony.

Petitioners now lean on *Watkins* regarding the pertinency of the questions asked by the committee.

We understand *Watkins* to teach that a conviction for contempt under 2 U. S. C., sec. 192 cannot stand unless the questions asked are pertinent to the subject matter of the investigation. (*Watkins v. United States*, 354 U. S. 178, at pp. 214-215; *Barenblatt v. United States*, 360 U. S. 109, at p. 123).

Preliminarily a major difference between *Watkins* and the instant cases is apparent. Watkins was prosecuted for contempt under a criminal statute because of his refusal to testify before the Subcommittee. Petitioners however were not faced with any criminal sanctions for their refusals to testify. Dismissal pursuant to Section 1028.1 of the Government Code is not a penal action, and discharge is not a criminal sanction. (*Bailey v. Richardson*, 182 F. 2d 46.)

Further, Watkins had a difficult choice when faced with the necessity of answering questions. Since 2 U. S. C. sec. 192 is a criminal statute, Watkins had the right to have available through a sufficiently revealing statute, information indicating the standard of criminality to which he would be held. Because this statute defines the crime as refusal to answer "any question pertinent to the question under inquiry," part of the standard of criminality is the pertinency of the questions propounded. According to this Court, this standard requires a witness confronted with a particular question to preguess at his peril, the court's subsequent ruling on its pertinency.

Faced with this problem of choice, Watkins was entitled to know the pertinency of the questions to the subject matter. "That knowledge must be available with the same degree of explicitness and clarity that the due process clause requires in the expression of any element of a criminal offense." (*Watkins, supra*, 354 U. S. at p. 209; *Cf. Scull v. Virgina*, 359 U. S. 344).

At the outset, this problem did not confront petitioners since the questions asked them were not amorphous on their face. Nelson, for example, refused to answer the question:

> "Are you a member of the Communist Party today?" [R. 38, Find. of Super. Ct., R. 124].

Globe also refused to answer this particular question [R. 164, 175]. Petitioners were not impailed on the *Watkins* dilemma because refusal to answer this particular question is specifically made a ground for dismissal under Section 1028.1(d) of the Government Code of California. Therefore, at the time the questions were propounded to them petitioners were aware, beyond doubt, of their pertinency.

Assuming, *arguendo*, that although absent the criminal aspects of *Watkins*, the principle of that case is applicable in the instant cases, we submit that the Court below was correct in its view that the questions asked were pertinent.

An examination of the record discloses with "undisputable clarity" the pertinency of the questions propounded by the committee. Nelson, at the very least, was well aware of the "topic under discussion," since he indicated by his remarks at the hearing that he had been present at the opening session of the Committee and had

heard the Chairman's introductory remarks [R. 24, 42].[5] These remarks consisted of statements of the Committee's function and purpose [R. 17-18] and statements concerning the subject matter under inquiry. Concerning the latter, the Chairman stated:

> "In the course of this investigation Communist Party activities of other individuals in the field of labor, business and government have come to the attention of the staff, and will also be the subject of investigation and of this hearing.
>
> The committee took extensive testimony in Chicago during December of 1955, and in the city of Washington in February and March, relating to Communist Party activities of employees in various agencies of the United States Government. During the course of these hearings testimony was received divulging the existence of heretofore undisclosed Communist Party cells which operated in various government agencies at various locations throughout the country.
>
> There will be heard, before the conclusion of these hearings, certain witnesses whose identity was disclosed during the course of the above hearings." [R. 19-20].

Having this source of information available to him, Nelson cannot now say that he was not aware of the Subcommittee's authority and purpose to question him as it did.

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[5]While Globe testified the day after the opening session, the record does not indicate that he was actually present at the first session and heard the opening remarks [R. 159, 150]. Therefore, we do not argue that Globe knew from personal knowledge of this source of information.

Additionally, in both *Nelson* and *Globe*, other sources of information were available to petitioners by which pertinency can be gleaned. The authorizing resolution in light of this Court's decision in *Barenblatt, supra*, cannot be said to be so vague *per se* as to be unenlightening to petitioners on the score of pertinency.

Further, it is apparent that the very questions both petitioners refused to answer related to their own Communist Party affiliations, questions "whose pertinency of course were clear beyond doubt." (*Barenblatt v. United States*, 360 U. S. at p. 125, *Cf. Watkins v. United States*, 354 U. S. at pp. 182-185).

The record in the instant cases, we submit, clearly shows the presence of many of the sources of information which *Watkins* requires. These sources made the subject of the inquiry by the Committee quite clear at the time the questions were propounded. Therefore, it would appear that the duty of the committee to explain pertinency in the face of a pertinency objection did not arise (*Cf. Barenblatt v. United States*, 360 U. S. at p. 124).

However while we feel that these multiple sources of information leave no room for a pertinency objection, still the responses of the Committee's members when faced with such an objection in *Nelson* were more than adequate to fulfill any reciprocal obligation to explain pertinency. For example, faced with Nelson's pertinency objection, Representative Donald L. Jackson explained:

> "If the Congress of the United States, or any of its committees, does not have the right to legislate with respect to federal employees, or to make inquiry into matters concerning federal employees, past or present, who are members or have been members

of the Communist Party, then there is certainly something very awry as far as the investigating power of the Congress is concerned.

This is one area in which there should be absolutely no question as to the jurisdiction of the Congress.

The Congress would be derelict indeed if it permitted a situation to go unnoticed in which there were past or present members of the Communist Party employed, especially in light of the action of the Congress of the United States in outlawing the Communist Party." [R. 27].

Nelson, of course was a former employee of the Federal Government [R. 47, 57, 63].

As well, the remarks of Congressman Clyde Doyle [R. 38-43] amply illuminate the pertinency of the questions propounded to Nelson.

POINT V.

Petitioners Did Not Have the Right to Assert the Protection of the First Amendment to Forestall Pertinent Inquiry by the Sub-Committee as to Petitioners' Membership in the Communist Party.

Before a duly authorized Sub-Committee of the House Committee on Un-American Activities, petitioners refused to answer questions relating to their past and present membership in the Communist Party. Their refusals to answer were premised on the First Amendment, supplemented by the Fifth Amendment to the Constitution of the United States.

Admittedly, where First Amendment rights are asserted to prevent inquiry by the Government, "resolution of the issue always involves a balancing by the

courts of all competing, private and public interests at stake in the particular circumstances shown" (*Barenblatt v. United States*, 360 U. S. at p. 126).

That reliance on the First Amendment privilege before a Sub-Committee inquiring as to Communist Party affiliations is misplaced was pointed out in *Barenblatt, supra*. There, that precise issue was before this Court. *Barenblatt* indicates that, on balance, the governmental interests at stake in the Sub-Committee's investigation are greater than individual interests, and that therefore the provisions of the First Amendment cannot be said to have been offended when questions concerning the individuals Communist Party affiliations are propounded.

Clearly, then, irrespective of their rights under the Fifth Amendment, petitioners did not have a right to resist on the basis of the First Amendment, pertinent inquiry by a duly authorized Sub-Committee as to their associational relationships.

POINT VI.

The California Statute Does Not Operate as a Bar or Prohibit the Exercise of Constitutional Privileges nor Was It the Purpose of the Statute to Coerce Testimony Before the Federal Committee.

Petitioners claim that the State statute in its effect as well as its purpose was to coerce testimony before the Federal Committee and was created to curtail the free exercise of the First and Fifth Amendment Rights.

Since we have previously pointed out that this Court has indicated that an individual's right to refuse to testify before a Federal Committee on the basis of the First Amendment is subordinate to the rights of the Federal

Committee to compel such testimony, (*Barenblatt v. United States*, 360 U. S. 109), we limit our reply to the claimed abridgement of Fifth Amendment rights.

The Court below firmly pointed out that the California statute does not operate to bar or prohibit the exercise of the privilege against self-incrimination.

> "Any point raised by petitioner that the statutory requirements of section 1028.1 bar or prohibit his privilege of self-incrimination has heretofore been decided by the Supreme Court in the case of *Steinmetz v. Cal. State Board of Education*, 44 Cal. 2d 816. The court said, at page 824: 'Moreover, a person may properly be required to disclose information relevant to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though the disclosure under some circumstances may amount to self-incrimination. (Citations). A public employee, of course, cannot be forced to give an answer which may tend to incriminate him, but he may be required to choose between disclosing information and losing his employment.'" [R. 135-136].

In tracing the history of the privilege against self-incrimination this Court stated in *Knapp v. Schweitzer*, 357 U. S. 371 at pp. 379-380:

> "In construing the Fifth Amendment and its privilege against self-incrimination, one must keep in mind its essential quality as a restraint upon compulsion of testimony by the newly organized Federal Government at which the Bill of Rights was directed, *and not as a general declaration of policy against compelling testimony*. It is plain that the amendment can no more be thought of as restrict-

ing action by the States than as restricting the conduct of private citizens. The sole—although deeply valuable—purposes of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man of his own mouth." (Emphasis ours).

The assertion that the purpose of the California statute was to coerce petitioners into testifying before a Federal Committee has no basis in fact. We submit that the record is barren of evidence that the State statute was used as an instrument of compulsion of testimony. In point of fact petitioners' rights to assert the privilege of self-incrimination was scrupulously recognized and guarded. The statute was not the basis of Federal prosecution or investigation nor is that a scintilla of evidence of any collaboration between Federal, local or State agencies or offices. (*Cf. Knapp v. Schweitzer*, 357 U. S. 371, 380). Petitioners were dismissed quite independently of their exercise of a Constitutional privilege.

POINT VII.

The California Statute Does Not Act to Abridge a Privilege or Immunity Protected by the Fourteenth Amendment.

In the Court below, petitioners relied on, and the Court discussed, the application of the due process clause of the Fourteenth Amendment to petitioners' cases. Independent of that reliance petitioners now argue for the first time in this forum that the California statute abridges the

privileges and immunities clause of the Fourteenth Amendment.[6]

Before the Federal Committee, petitioners elected to exercise their privileges against self-incrimination. The validity of this exercise was recognized on all levels of the Federal and local proceedings. Having which exercised the privileges, petitioners cannot now maintain they were deprived of it.

Petitioners were dismissed not because of the exercise of constitutional rights but because of the mere fact of their refusal to answer. Therefor, the question of curtailment of a constitutional privilege is academic. Further, petitioners cannot rely on the "privileges or immunities" clause, because the only thing that has been taken away from them was their public employment.

We submit that petitioners argument that the Fifth Amendment privilege must be deemed part of "privileges and immunity of citizens of the United States" is too broad in its scope and ignores the narrow interpretations of the "Privileges or Immunities" clause by this Court.

In the *Slaughterhouse Cases,* 16 Wall. 36, this Court defined the nature of the Privileges and Immunities pro-

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[6]Petitioners did not raise this point in, nor was it considered by the State Court. The question of the applicability of the "privileges and immunities" clause was raised by the petitioners for the first time in their Petition for Certiorari. We respectfully submit therefore that this Court need not pass upon this question. *Cf. Wilson v. Cook,* 327 U. S. 474 where this Court stated at page 483:

> "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising out of a different or the same clause in the Constitution with respect to which other questions are properly presented."

tected by the Fourteenth Amendment. It was pointed out that the Privileges and Immunities guaranteed by the clause are those of citizens of the United States as distinguished from those of citizens of the States. It was not the purpose of the American Constitution to transfer the protection of fundamental rights from the States to the Federal Government. As noted by this Court in *Knapp v. Schweitzer*, 357 U. S. 371 at p. 374 (footnote No. 1):

> "No force or validity is added to petitioner's argument by the invocation of the Supremacy Clause, Art. VI, cl. 2, and the Privileges and Immunities Clause of the Fourteenth Amendment. Whatever the applicability of the Fifth Amendment, it is in no way expanded by those two provisions. Cf. Twining v. New Jersey, *supra*, at 99: '[T]he exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship. . . .'"

Petitioners claim that assuming they validly invoked a Federal privilege in a Federal proceeding, subsequent dismissal from public employment abridges their privileges and immunities as citizens of the United States.

But this argument blurs the distinction between petitioners immunity from self-incrimination under the Federal Constitution and their "privilege" of being public employees. This latter "privilege" is not one that adheres in them as citizens of the United States but is one created solely by the State.

Hamilton, et al. v. Regents of University of California, 293 U. S. 245, supplies the distinction. This Court stated there at 261-262:

> "The clauses of the Fourteenth Amendment invoked by appellants declare: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law.' Appellants' contentions are that the enforcement of the order prescribing instruction in military science and tactics abridges some privilege or immunity covered by the first clause and deprives of liberty safeguarded by the second. The 'privileges and immunities' protected are only those that belong to citizens of the United States as distinguished from citizens of the States—those that arise from the Constitution and laws of the United States as contrasted with those that spring from other sources. (Citations). Appellants assert—unquestionably in good faith—that all war, preparation for war, and the training required by the university, are repugnant to the tenets and discipline of their church, to their religion and to their consciences. The 'privilege' of attending the university as a student comes not from federal sources but is given by the State. It is not within the asserted protection. The only 'immunity' claimed by these students is freedom from obligation to comply with the rule prescribing military training. But that 'immunity' cannot be regarded as not within, or as distinguishable from, the 'liberty' of which they claim to have been deprived by the enforcement of the regents' order. If the regents'

order is not repugnant to the due process clause, then it does not violate the privileges and immunities clause."

It is submitted that the privilege of working for the County of Los Angeles comes not from Federal sources but from the State and local government and as such is not within the asserted protection of the Privileges and Immunities Clause of the Fourteenth Amendment.

As pointed out above, where this Court has accorded Constitutional protection to public employment, such protection is fused solely onto the due process clause of the Fourteenth Amendment and not the privilege and immunities clause. This protection prohibits dismissal from employment pursuant to a statute on patently arbitrary or discriminatory grounds. (*Slochower v. Board of Education*, 350 U. S. 551; *Wieman v. Updegraff*, 344 U. S. 183).

Since it is not arbitrary to dismiss a public employee who validly claimed the state privilege against self-incrimination, *Lerner v. Casey*, 357 U. S. 68, we submit that it is no more arbitrary to dismiss an employee who has claimed a valid privilege in a Federal proceeding. As petitioners' discharges are not repugnant to the due process clause, they do not violate the privilege and immunities clause.

Conclusion.

It is therefore submitted that petitioners were properly discharged from their public employment for insubordination and a violation of Section 1028.1 of the Government Code of the State of California, and that the decision of the Court below upholding their discharges should be affirmed.

Respectfully submitted,

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